No. 77-57

In the Supreme Court of the United States

OCTOBER TERM, 1977

CONRAD L. GERMAIN, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 552 F. 2d 868.

JURISDICTION

The judgment of the court of appeals was entered on March 24, 1977. A petition for rehearing was denied on May 16, 1977 (Pet. App. B). Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to July 14, 1977, and the petition was filed on July 11, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence presented at trial was sufficient to sustain petitioners' convictions for mail fraud.

2. Whether petitioners' fraudulent advertisement of their diet booklet was protected by the First Amendment.

3. Whether certain remarks in the prosecutor's closing argument deprived petitioners of a fair trial.

4. Whether certain instructions to the jury constituted plain error.

STATEMENT

Following a jury trial in the United States District Court for the Central District of California, petitioners were convicted on 18 counts of mail fraud, in violation of 18 U.S.C. 1341. Petitioners Germain and Kane were each sentenced to consecutive terms of five years' imprisonment on each count and fined $18,000, pending the results of a study by the Attorney General as provided in 18 U.S.C. 4208(c).[1] The corporate petitioner was fined $18,000. The court of appeals affirmed (Pet. App. A).

The evidence showed that in 1972 petitioners Germain and Kane established the Outpost Development Company in order to conduct a mail order business under the names of Lydia Feldman Methods and Brenda Hardy Research. Petitioners thereafter mailed interstate solicitations entitled "Want to Lose Weight?" (Pet. App. E). The solicitations, written under the fictitious name "Lydia Feldman," explained that in the course of her studies of

[1]Since their convictions, petitioners have been free on personal bond. As a consequence, the study ordered by the district court has not yet been conducted.

"some occult writings" Lydia had accidently discovered a tonic which, if taken regularly, would convert the "unburned" portion of a person's caloric intake into energy. Readers were invited to send Lydia $5.95 for the tonic's recipe and were promised a full refund if not satisfied.[2] Numerous customers who remitted the requested amount received by return mail a copy of the booklet "MY SECRET: The Lydia Feldman Method for Weight Control." Persons wishing to participate in the weight loss program described in the booklet were instructed to consume three times daily a mixture of half a cup of grape juice, half a cup of apple juice, and a large mashed banana. Some versions of the booklet recommended that the "tonic" be taken before meals (Tr. 304-308; Pet. App. F); other versions urged that the tonic be used as a substitute for meals (Tr. 280-316).

At trial, the government produced expert witnesses who testified that taking the diet tonic with meals would not result in weight loss but in fact would cause significant weight gain (Tr. 308-309, 1149), and that, while taking the diet tonic instead of meals might cause weight loss, it would also produce a severe protein and mineral deficiency, ultimately resulting in liver damage, anemia, and chronic malnutrition (Tr. 313, 1148-1149). Lay witnesses testified for the prosecution either that they had sent petitioners checks for $5.95 but had never received copies of the diet plan (Tr. 387-389, 407-408, 525) or that they had requested a refund after being dissatisfied with the plan but had never received one (Tr. 531-532, 544).

[2]Petitioners also mailed similar solicitations written under the fictitious name "Brenda Hardy" (Tr. 397-404). In response to their solicitations, petitioners received, over an extended period of time, more than one thousand pieces of mail daily from the consuming public (Tr. 588-589, 608-609, 623).

ARGUMENT

1. Each count of the indictment alleged that petitioners had devised a scheme to defraud persons throughout the United States and to obtain money from those persons by means of false and fraudulent pretenses, representations, and promises. The indictment further alleged that, as part of that scheme, petitioners had mailed solicitations containing numerous false and fraudulent representations, including, for example, that Lydia Feldman was a real person, that her secret recipe would change food into energy rather than fat, and that positive results were guaranteed or the purchase price of the Feldman booklet would be refunded. In its instructions on the elements of the mail fraud offense, the district court charged the jury as follows (Tr. 1294):

> It is not essential that the Government prove each and every false pretense, representation or promise alleged to have been made, but it is essential that the proof show beyond a reasonable doubt that a particular defendant made, or caused to be made, any one of the alleged false and fraudulent promises, representations and pretenses, as alleged.
>
> * * * * *
>
> Further, any such statements, in order to find any defendant whom you are considering guilty of any offense that you are considering, as set forth in any of the counts, must be found beyond a reasonable doubt to be a substantial statement and substantially false at the time any such defendant mailed or caused to be mailed any matter.

Petitioners contend (Pet. 8-11) that their convictions must be reversed because the district court authorized the jury to return a guilty verdict if it was convinced beyond a

reasonable doubt that petitioners had made "any one" of the alleged false promises and representations, whereas, they claim, the evidence presented by the government was insufficient to establish the fraudulent nature of several of the representations listed in the indictment. The general form of the jury's verdict, in petitioners' view, makes it impossible to determine whether the jury's actual finding of fraud was supported by adequate evidence. Relying on a line of cases beginning with *Stromberg* v. *California*, 283 U.S. 359, petitioners assert that their convictions cannot stand.

Petitioners' argument is based on a misconception of the mail fraud offense. A crime is committed under 18 U.S.C. 1341 when an individual devises a scheme to defraud, and then uses the mails or causes the mails to be used for the purpose of executing that scheme. Completion of the offense does not depend upon the making of a false or fraudulent representation. As the Tenth Circuit has explained in a case involving the statutory predecessor to Section 1341:

> It is not the making of the false pretenses, representations, or promises that constitutes the first element of the offense. It is the devising or intending to devise the scheme. It is neither necessary to allege nor prove that the false pretenses, representations, or promises were actually made. But proof that the false pretenses, representations, or promises were made is usually adduced to establish the scheme charged in the indictment.

Graham v. *United States*, 120 F. 2d 543, 544 (C.A. 10) (footnote omitted). Thus, even assuming that none of the specific representations alleged in the indictment was in itself fraudulent, the jury would not have been precluded from finding that petitioners had devised a scheme to

defraud and had used the mails to implement that scheme. See also *United States* v. *Reicin*, 497 F. 2d 563, 569 (C.A. 7), certiorari denied, 419 U.S. 996; but see *Schaefer* v. *United States*, 265 F. 2d 750, 753 (C.A. 8), certiorari denied, 361 U.S. 844. Thus, to the extent that the district court's instructions to the jury required for conviction a finding that petitioners had made a "substantially false" statement in the Lydia Feldman solicitations, those instructions were significantly more favorable than petitioners had a right to demand.

Secondly, even if the making of an identifiable fraudulent representation were a necessary aspect of a mail fraud violation, petitioners' convictions would not be rendered invalid by a failure to prove the fraudulent nature of each statement alleged in the indictment. It is well settled that not every allegation of an indictment charging a scheme to defraud need be proved in order to sustain a conviction. See, *e.g.*, *United States* v. *Zeidman*, 540 F. 2d 314, 317-318 (C.A. 7), certiorari denied, 429 U.S. 918; *United States* v. *Joyce*, 499 F. 2d 9, 22 (C.A. 7), certiorari denied, 419 U.S. 1031. Instructions similar to those given in this case by the district court have been repeatedly approved. See, *e.g.*, *United States* v. *Serlin*, 538 F. 2d 737, 748 (C.A. 7); *United States* v. *Joyce*, *supra*; *Schaefer* v. *United States*, *supra*; La Buy, *Manual on Jury Instructions in Federal Criminal Cases*, Part II, § 16.02, 36 F.R.D. 457, 601. As the court of appeals correctly found, the prosecution in this case presented evidence clearly sufficient to support a jury finding that petitioners had fraudulently represented the Feldman tonic's capacity to convert caloric intake into energy rather than fat. Taken as a whole, the evidence at trial demonstrated beyond a reasonable doubt both the existence of a fraudulent scheme and the use of the mails to further that scheme.

Petitioners' reliance on *Stromberg* v. *California*, *supra*, *Williams* v. *North Carolina*, 317 U.S. 287, and *Yates* v. *United States*, 354 U.S. 298, is misplaced. As the court of appeals noted (Pet. App. A 3):

> [T]he convictions [in those cases] were reversed because they could have been based on an erroneous legal ground. Such convictions are defective. * * * [They are, however,] distinguishable from the instant case, in which appellants claim that the jury could have based its finding of fraud on *facts* for which the evidence was insufficient.

In the latter situation, the general rule is as stated by this Court in *Turner* v. *United States*, 396 U.S. 398, 420: "[W]hen a jury returns a guilty verdict on an indictment charging several acts in the conjunctive, * * * the verdict stands if the evidence is sufficient with respect to any one of the acts charged."[3]

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[3]*Cramer* v. *United States*, 325 U.S. 1, is not to the contrary. That case involved a prosecution for treason. The relevant statutory section (18 U.S.C. (1940 ed.) 1) provided only that

> [w]hoever, owing allegiance to the United States, levies war against them or adheres to their enemies, giving them aid and comfort within the United States or elsewhere, is guilty of treason.

Article III, Section 3 of the Constitution, however, provides that "[n]o person shall be convicted of Treason unless on the Testimony of two Witnesses to the same overt Act, or on Confession in open Court." Interpreting this constitutional requirement, the Court in *Cramer* stated (325 U.S. at 34; footnotes omitted):

> The very minimum function that an overt act must perform in a treason prosecution is that it show sufficient action by the accused, in its setting, to sustain a finding that the accused actually gave aid and comfort to the enemy. * * *

Finding that two of the three overt acts submitted to the jury did not meet this standard, the Court reversed petitioner's treason conviction.

2. Petitioners maintain (Pet. 12-16) that the communications contained in their direct mail solicitations are protected by the First Amendment. This argument is without merit. The First Amendment does not protect false or fraudulent commercial advertising. *Lynch* v. *Blount*, 330 F. Supp. 689, 694 (S.D. N.Y.), affirmed, 404 U.S. 1007. Indeed, in a recent decision describing the First Amendment's protection of commercial speech, this Court took pains to emphasize that the Constitution "does not prohibit the State from insuring that the stream of commercial information flow cleanly as well as freely." *Virginia State Board of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771-772.

3. Petitioners next assert that they were deprived of a fair trial through the cumulative effect of certain remarks made by the prosecutor during his closing argument. At trial, petitioners raised only one objection to the prosecutor's comments. In his closing argument, defense counsel stated (Tr. 1244):

> [The government has] shown that three or four people did not get refunds. That is the whole evidence in this case. You are not to imagine, conjecture, speculate as to what else [the government] might have proven, because that is all [the government] chose to prove. That is all, perhaps, [it] could prove.

In rebuttal, the prosecutor told the jury (Tr. 1258-1259):

> You are allowed to draw any natural or ordinary inferences you might draw from the evidence. You

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The affinity between *Stromberg* and *Cramer* is obvious. In both cases, the jury's guilty verdict might have rested on unconstitutional grounds; in neither case was this Court asked to review a claim that the jury may have found facts supported by insufficient evidence.

> are allowed, you are supposed, to use your common sense and draw whatever reasonable inferences you may from the evidence. [Defense counsel] would have us bring in 10,000 people who did not get refunds. We are not going to bring in 10,000 people, ladies and gentlemen; we are just not going to do it. We brought in some people. They tried to get refunds, and they did not get them.

The district judge overruled petitioners' objection to this statement and, at the same time, repeated his earlier admonition to the jury that counsel's remarks were argument, not testimony or evidence (Tr. 1259).

A more liberal standard is employed in evaluating rebuttal, as opposed to initial, argument. See, *e.g.*, *United States* v. *Lawler*, 413 F. 2d 622, 628 (C.A. 7), certiorari denied, 396 U.S. 1046; *Gray* v. *United States*, 394 F. 2d 96, 101 (C.A. 9), certiorari denied, 393 U.S. 985. The prosecutor's comments were a legitimate response to the earlier argument of defense counsel. In any event, when considered in the light of all the evidence, the prosecutor's remarks did not deprive petitioners of a fair trial.[4] See *United States* v. *Bowen*, 500 F. 2d 41 (C.A. 6), certiorari denied, 419 U.S. 1003.

4. Petitioners contend finally (Pet. 20) that their convictions should be reversed because the district court gave conspiracy instructions to the jury although no conspiracy offense was charged in the indictment. Petitioners raised no objection to the court's instructions at the time they were given. Even now, petitioners have

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[4]Viewed separately or together, the other portions of the prosecutor's argument with which petitioners now find fault do not constitute plain error and hence do not justify reversal in the absence of objection at trial.

not explained how they were prejudiced by the district court's alleged failings. The court of appeals correctly concluded (Pet. App. A 5-7) that the instructions given were accurate and clear as to the essential elements of mail fraud, and that any flaws in those instructions did not constitute plain error under Rule 52(b), Fed. R. Crim. P. See *Henderson* v. *Kibbe*, No. 75-1906, decided May 16, 1977, slip op. 8 ("It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court").

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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